



FILED
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U.S. DISTRICT COURT
CLERK

8 UNITED STATES DISTRICT COURT
9 DISTRICT OF NEVADA

10 GERALD ARMSTRONG,

11 Plaintiff,

CV-N-97-670-ECR (RAM)

12 v.

13 CHURCH OF SCIENTOLOGY
14 INTERNATIONAL, a California
15 corporation, et al.,

O R D E R

16 Defendants.
_____ /

17 On September 29, 1998, defendants filed a motion for
18 attorneys' fees (#75). The motion seeks attorneys' fees, as
19 sanctions against plaintiff and his counsel, on two bases:
20 28 U.S.C. § 1927 and under the inherent powers of the court. The
21 motion does not seek attorneys' fees for defendants simply as the
22 prevailing parties in the action.

23 More particularly, defendants seek attorneys' fees on the
24 following grounds:

- 25 1. That the affidavit of plaintiff filed June 9, 1998,
26 in this case in opposition to defendants' motion to dismiss

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1 was at a minimum deceptive, if not patently false. The
2 statements in question include the claim that plaintiff has
3 been a resident of Nevada since November, 1997, has never
4 stated since then that he was not a resident of Nevada,
5 received substantive non-junk mail at his Nevada post office
6 box since November, 1997, has a Nevada driver's license, is
7 actively engaged in work in Nevada, and keeps his personal
8 property in Nevada.

9 2. The brief filed by plaintiff's counsel on June 9,
10 1998, in opposition to defendants' motion to dismiss
11 reiterated and endorsed deceptive and/or false statements of
12 fact set forth in plaintiff's affidavit filed on the same
13 date.

14 3. That plaintiff knew the true facts when he executed
15 the affidavit filed June 9, 1998, and the plaintiff's counsel
16 also knew the true facts when he filed the affidavit and brief
17 on June 9, 1998.

18 4. That had the true facts been disclosed in the
19 affidavit and brief filed June 9, 1998, and had the affidavit
20 and brief not been deceptive or false, this court would have
21 readily granted defendants' motion to dismiss without
22 defendants having to incur attorneys' fees and costs after
23 June 9, 1998. Defendants seek only attorneys' fees and costs
24 incurred from June 9, 1998, until the court's decision was
25 made on the motion.
26

1 The claim of falsity of plaintiff statements in the
2 affidavit and as incorporated in the brief is in turn based
3 on:

4 (a) this court's finding that plaintiff was never a
5 bona fide Nevada resident;

6 (b) that plaintiff stated on the Internet after
7 November 24, 1997, that he had not yet completed
8 his move to Nevada;

9 (c) plaintiff was unable to produce in discovery or at
10 the evidentiary hearing any mail sent to him in
11 Nevada and admitted he had not notified the
12 publisher of a periodical he received that he had
13 moved to Nevada;

14 (d) that plaintiff omitted from the statement that he
15 had a Nevada driver's license that he first applied
16 for it one month after his claimed date of Nevada
17 citizenship in Nevada of November 24, 1997;

18 (e) that the only work plaintiff had done in Nevada was
19 working on his own case with his counsel; and that
20 defendants' employment as his attorney's paralegal
21 was for only an average of four hours per week for
22 the less than the thirty days plaintiff was in
23 Nevada between November, 1997, and August 1998;

24 (f) that the claim plaintiff keeps his personal
25 property in Nevada was false because the referenced
26 personal property consisted of his papers, his

1 Scientology files, which were in Nevada,
2 California, and Canada; and that the papers in
3 Nevada were in his attorney's office because he was
4 using them to represent plaintiff; that the only
5 other personal property of plaintiff was his
6 computer which was never in Nevada;

7 (g) that plaintiff concealed from the Court that his
8 actual residence in Nevada was his attorney's law
9 office, and that the "law firm" plaintiff was doing
10 work for was actually his own attorney; that he was
11 not really employed in Nevada; that the claim of
12 having personal property in Nevada was at best
13 deceptive; and that plaintiff spends the
14 overwhelming amount of his time in Canada, coming
15 to Nevada only when necessary for his case.

16 Defendants conclude on this basis that had the Court had
17 knowledge of the true facts which were withheld or in respect to
18 which it was deceived, no evidentiary hearing would have been
19 necessary and the Court would have granted defendants' motion to
20 dismiss.

21 Finally, defendants argue that plaintiff and his counsel
22 engaged in discovery obstruction and misconduct, forcing defendants
23 repeatedly to have to go to the Court for assistance in obtaining
24 discovery.

25 In his opposition (#85) to the motion for attorneys' fees
26 plaintiff does not oppose or challenge the substantive allegations

1 made by defendants but contents himself to rely on technical
2 objections that the motion was not timely filed and that the motion
3 does not in its content comply with the requirements of the local
4 rules.

5 Sanctions under 28 U.S.C. § 1927 may be in the form of
6 attorneys' fees as are here requested by defendants. Only the
7 attorney may be sanctioned under section 1927. The plaintiff
8 himself may not be sanctioned under this statute. Under this
9 section an attorney " who so multiplies the proceedings in any case
10 unreasonably and vexatiously may be required by the court to
11 satisfy personally the excess . . . attorneys' fees reasonably
12 incurred because of such conduct."

13 To impose such sanctions, the Court must make an express
14 finding that counsel acted knowingly, recklessly or in subjective
15 bad faith.

16 For such sanctions to be imposed because a filing was
17 submitted knowingly or recklessly, it must be frivolous; if it is
18 not frivolous, it must be intended to harass the opponent.
19 Reckless, non-frivolous findings are not subject to sanctions.

20 Subjective bad faith is present when an attorney
21 knowingly or recklessly raises a frivolous argument or argues a
22 meritorious argument to harass an opponent. The behavior of the
23 attorney need not be objectively unreasonable.

24 If we apply these criteria to defendants' grounds for
25 sanctions, it does not appear that plaintiff's counsel's conduct
26 rises to the level which is sanctionable under Section 1927.

1 It does not necessarily follow from our decision, that
2 plaintiff was not a citizen of Nevada on the date the action was
3 filed, that plaintiff and his counsel knowingly or recklessly
4 raised a frivolous argument or argued a meritorious argument merely
5 to harass the opposition. The activities of plaintiff and his
6 counsel could probably best be characterized as doing the best you
7 can with what little you have to work with; in this case there
8 wasn't much to work with for plaintiff to try to establish a Nevada
9 residence on the date in question. Although plaintiff's evidence
10 was weak, it was not frivolous and although insubstantial, the
11 evidence was not raised merely to harass the defendants.

12 At the evidentiary hearing, plaintiff claimed his
13 residence was his attorney's law office or a room in his attorney's
14 home. Those claims, while they eventually did not show plaintiff
15 had a residence in Nevada were not purely frivolous.

16 Plaintiff's statement on the Internet after November 24,
17 1997, that he had not yet completed his move to Nevada was damaging
18 to his claim of residence, but could be fairly interpreted to mean
19 that he still had some additional personal property to move to
20 Nevada, and did not necessarily mean plaintiff himself, had not
21 established a Nevada residence. No evidence was received at the
22 hearing of statements by plaintiff to Sheila M. Werner respecting
23 plaintiff's intention to live in Nevada.

24 The failure to produce any mail received at plaintiff's
25 claimed post office box in Nevada made the claim of having such a
26

1 post office box in Nevada suspect and doubtful, but didn't prove
2 the claim was frivolous.

3 Plaintiff's statement in the affidavit filed May 9, 1998,
4 that "I have a Nevada driver's license" is stated in then present
5 tense terms, rather than as of November 24, 1997. Since the issue
6 in question was whether plaintiff was a Nevada resident on
7 November 24, 1997, perhaps the statement suggests that he had such
8 a license on that date. But that is not necessarily the only
9 reasonable implication which can be made from the statement. It
10 does not seem unreasonable that a person would apply for a local
11 driver's license within approximately a month after moving here.
12 This may not strictly comply with Nevada law requirements, but is
13 likely not an unusual or unreasonable course of events.

14 Plaintiff's claim that he has "work in Nevada" may imply
15 that he is not merely working on his own case, in this court, but
16 is otherwise engaged in some sort of gainful employment. At the
17 evidentiary hearing, plaintiff offered some testimony that he was
18 working on someone else's legal cases as a paralegal for his
19 attorney. This testimony was not corroborated and was not accepted
20 by the Court as persuasive evidence of residence. Nevertheless,
21 while perhaps incomplete, the statement in the affidavit that
22 plaintiff had "work in Nevada" is not a purely false argument on
23 its face.

24 Plaintiff's statement in the June 9, 1998, affidavit that
25 he kept his personal property in Nevada was also on its face not
26 purely false or frivolous. A person could make such a statement

1 and yet have property elsewhere. The fact that the only personal
2 property plaintiff had in Nevada in addition to the clothes on his
3 back was his Scientology papers and possibly some other "papers"
4 showed he had some "personal property" in Nevada. He testified he
5 owned few other items of personal property and while this testimony
6 was largely impeached it remained he had some personal property in
7 Nevada.

8 Had complete true facts been included in the statements
9 in the June 9, 1998, affidavit, it would not necessarily have meant
10 that no evidentiary hearing would have been held. In spite of the
11 shortcomings of plaintiff's evidence, even the complete statement
12 of the true facts might still have warranted an evidentiary
13 hearing. The position of plaintiff and his counsel was not
14 knowingly or recklessly frivolous and the arguments, to the extent
15 they might have been meritorious were not made merely to harass
16 defendants.

17 The inherent power of the court to sanction plaintiff and
18 his counsel follows much the same analysis as that used for
19 28 U.S.C. § 1927 and with essentially the same result. The
20 exercise of inherent power is, among other things, focused on
21 supervision and discipline of officers of the Court; to aid in the
22 efficient operation of the court; to protect the due and orderly
23 administration of justice; and to maintain the authority of the
24 Court. When a party has acted in bad faith, vexatiously, wantonly
25 or for oppressive reasons, sanctions under the Court's inherent
26 powers may take the form of attorneys' fees. Such sanctions in a

1 case like this require that counsel's conduct constituted or was
2 tantamount to bad faith. A finding of bad faith is warranted where
3 an attorney knowingly or recklessly raises a frivolous argument or
4 argues a meritorious claim for the purpose of harassing an
5 opponent. Our findings with respect to the analysis under
6 28 U.S.C. § 1927 applies to exercise of inherent powers in this
7 respect. While the conduct of plaintiff and his counsel was hardly
8 meritorious, the arguments made were not merely frivolous or made
9 to harass defendants.

10 The bad faith requirement for exercise of inherent powers
11 sets a high threshold, insuring that restraint is properly
12 exercised preserving the balance between protecting the integrity
13 of the judicial proceedings and encouraging meritorious arguments.
14 Such threshold, while approached, was not crossed here.

15 In inherent powers cases, a party also demonstrates bad
16 faith by delaying or disrupting the litigation. There is, perhaps,
17 a fine line between vigorous, hard hitting litigation tactics and
18 delay or disruption of proceedings knowingly or recklessly caused.
19 Here plaintiff and his counsel certainly approached the threshold
20 of knowing and reckless delay or disruption, but the evidence is
21 insufficient for a finding of bad faith on this basis. The
22 evidence is not sufficient to show that plaintiff and his counsel
23 in filing these documents did so vindictively, or with obduracy, or
24 mala fides.

1 While hardly worthy of the Good Conduct Medal, the
2 conduct of plaintiff and his counsel does not warrant imposition of
3 sanctions by way of award of attorneys' fees.

4 Plaintiff objected to defendants' pending motion for
5 attorneys' fees on the basis that it was tardy. The fourteen-day
6 time limit for filing such a motion is, however, not graven in
7 stone. Counting time in the usual fashion it appears the motion
8 was filed fifteen days after judgment was entered. Fed.R.Civ.P.
9 54(d)(2)(B) provides that such motion must be filed no later than
10 14 days after entry of judgment, unless otherwise provided by order
11 of the court. The Local Rule LR 54-16(a) does not appear to
12 contain any such exception. The civil procedure rule does permit
13 the Court in the case pending before it to extend the time for
14 filing motions and we elect to follow the rule of civil procedure
15 and to extend the time for filing by one day.

16 Plaintiff has not demonstrated he will suffer any
17 prejudice by the extension of time. While defendants have not
18 shown any credible excusable neglect or good cause for the tardy
19 filing of the motion, in the circumstances there could be a
20 misunderstanding or interpretation of the rule contrary to that in
21 which we have adopted and it is in the interests of justice that
22 the motion be considered on its merits, rather than being denied as
23 one day late.

24 Plaintiff's attack on the motion based on the claim its
25 content does not comply with the requirements of LR 54-16 and
26 Fed.R.Civ.P. 54(d)(2)(B) is misplaced. Contemporaneously with the